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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81-6937

ROBERT LEE WHITE, Petitioner

VS.

W. J. ESTELLE, JR., Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

The Petitioner, ROBERT LEE WHITE, prays that a Writ of Certiorari be issued, pursuant to Rule 17(c) of the Rules of this Court, to review the judgment of the United States Court of Appeals for the Fifth Circuit in Cause No. 81-1087 entered on April 15, 1982, in White v. Estelle, 669 F.2d 973 (5th Cir. 1982).

QUESTION PRESENTED

(Rule 21(1)(a))

I.

SHALL THE STANDARD OF REVIEW ANNOUNCED BY THIS COURT IN JACKSON V. VIRGINIA, 443 U.S. 307, 99 S.Ct. 781, 61 L.Ed.2d 560 (1979) BE APPLIED IN REVIEWING A COMPLAINT OF AN ADVERSE JURY VERDICT CONCERNING THE COMPETENCY OF A STATE CRIMINAL DEFENDANT TO STAND TRIAL, PRESENTED BY A PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO TITLE 28, §2254, UNITED STATES CODE?

II.

PARTIES

WAS THE PETITIONER TRIED AND CONVICTED WHILE INCOMPETENT TO STAND TRIAL, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

(Rule 21(b))

The following is a list of all parties to the proceedings in the United States Court of Appeals, whose judgment is sought to be reviewed:

1. Robert Lee White, Petitioner;

2. Brown, Harding, Fargason & Brown, Mike Brown, Attorney for the Petitioner;

3. W. J. Estelle, Jr., Director, Texas Department of Corrections;

4. Hon. Mark White, Attorney General of Texas;

5. Hon. Gerald Carruth, Assistant Attorney General of Texas, Austin, Texas.

OPINION BELOW

(Rule 21(e))

The United States Court of Appeals for the Fifth Circuit delivered its Panel Opinion on the 8th day of March, 1982, affirming the judgment of conviction. White v. Estelle, 669 F.2d 973 (5th Cir. 1982). See Appendix. The Petitioner's Motion for Rehearing was denied by said Court on April 15, 1982.

JURISDICTION

(Rule 21(e))

The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

(Rule 21(f))

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

"No person shall be. . . deprived of life, liberty, or property, without due process of law; . . .."

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, §I:

". . . nor shall any state deprive any person of life, liberty or property, without due process of law. . ."

STATEMENT OF THE CASE

(Rule 21(g))

This is a Petition for Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, denying Petitioner's Petition for Writ of Habeas Corpus, filed pursuant to Title 28, United States Code, §2254.

Petitioner was convicted of capital murder by a jury of the 137th Judicial District Court of Lubbock County, Texas, in

Cause No. 15,714, styled The State of Texas vs. Robert Lee White. Punishment was assessed at confinement for life in the custody of the Texas Department of Corrections. The Texas Court of Criminal Appeals affirmed the Petitioner's conviction in an opinion delivered December 12, 1979. White v. State, 591 S.W.2d 851 (Tex.Crim.App. 1980).

Prior to trial on the merits in state court, there was a competency hearing in this case, pursuant to Section 46.02 of the Texas Code of Criminal Procedure. The jury returned a verdict that the Petitioner was competent to stand trial. Petitioner did not take the witness stand in the trial on the merits. Another trial jury returned a verdict of guilty of capital murder, and the Court sentenced the Petitioner to life imprisonment. The Texas Court of Criminal Appeals ruled that it has no jurisdiction to review the weight and preponderance of the evidence, and made no ruling on Petitioner's claim here presented, but affirmed his conviction.

On June 30, 1980, Petitioner filed a pro se Petition for Writ of Habeas Corpus filed pursuant to Title 28, United States Code, §2254. The United States District Court for the Northern District of Texas, Lubbock Division, adopted the opinion of the Texas Court of Criminal Appeals, and entered its order denying Petitioner's Petition for Writ of Habeas Corpus.

On September 2, 1980, Petitioner filed a pro se Motion for Certificate of Probable Cause, Motion to Proceed in Forma Pauperis, and for Appointment of Counsel, and Notice of Appeal. On September 8, 1980, United States District Judge Halbert O. Woodward granted Leave to Proceed in Forma Pauperis, but denied the Certificate of Probable Cause.

On February 23, 1981, the United States Court of Appeals for the Fifth Circuit entered an order granting Certificate of Probable Cause and appointment of counsel in Cause No. 81-1087, styled Robert White, Petitioner vs. W. J. Estelle, Respondent, bringing this matter before that court. The appeal

was docketed on February 24, 1981, and the record on appeal was filed March 6, 1981. The Court of Appeals, after oral submission, entered its judgment affirming the denial of the Petition for Writ of Certiorari by the District Court, on the 20th day of March, 1982. On April 15, 1982, the Court of Appeals entered its order and judgment denying the Motion for Rehearing.

The Federal District Court, citing Jackson v. Virginia, held that there was some evidence upon which a rational trier of fact could have found Petitioner competent, and denied relief. Thereafter, Petitioner timely perfected appeal to the Court of Appeals, which affirmed.

BASIS FOR FEDERAL JURISDICTION

(Rule 21(i))

Federal jurisdiction in the United States District Court for the Northern District of Texas, the court of first instance, was invoked pursuant to Title 28, §2254, United States Code. Jurisdiction of the Court of Appeals arose under Title 28, §2291, U.S.C.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(Rule 21(j))

I.

THE DISTRICT COURT DENIED PETITIONER DUE PROCESS OF LAW BY ERRONEOUSLY APPLYING THE STANDARD OF REVIEW ANNOUNCED IN JACKSON V. VIRGINIA, RATHER THAN REVIEWING THE WEIGHT AND PREPONDERANCE OF THE EVIDENCE OF APPELLANT'S INCOMPETENCY.

This Court should issue its Writ of Certiorari because the United States Court of Appeals for the Fifth Circuit has decided an important question of federal constitutional law which has not been, but should be, settled by this Court. Sup.Ct.R17(1)(c). Specifically, the Court of Appeals has determined the standard of review which it will apply when reviewing a state prisoner's complaint of an adverse jury verdict on his competency to stand trial, when that complaint is presented by appeal from a denial of the writ of habeas corpus by a district court under 28 U.S.C.§2254. The standard announced by

the Court of Appeals is an erroneous standard of review which has the legal effect of denying the Petitioner due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

By state statute, Art. 46.02, Texas Code of Criminal Procedure, the Petitioner was required to prove by a preponderance of the evidence that he was incompetent to stand trial in state court. State law places the burden of proof by preponderance on the petitioner. Petitioner's claim throughout these appellate proceedings has been that he has discharged the burden of proof in the trial court and proved by a preponderance of the evidence that he was in fact incompetent to stand trial. His complaint on appeal is that the adverse jury verdict on his competency was contrary to the great weight and preponderance of the evidence and therefore, manifestly wrong and unjust. This petition concerns the proper standard of review to be applied by the federal district court, and the courts of appeals, to a state court jury verdict of competency prior to criminal proceedings. Petitioner contends that the standard of review announced by the United States Court of Appeals for the Fifth Circuit in this case is erroneous.

After his conviction in state court, the Petitioner appealed this verdict to the Texas Court of Criminal Appeals, complaining that the adverse jury verdict on competency was contrary to the great weight and preponderance of the evidence and manifestly wrong and unjust. The Court of Criminal Appeals refused to review the Petitioner's complaint of this adverse verdict, ruling that it had no jurisdiction to review the weight and preponderance of the evidence. White v. State, 591 S.W.2d 851 (Tex.Crim.App. 1980). The Court of Criminal Appeals stated that

> [w]hat appellant is asking this court to do is to consider all of the evidence -- that which supports the verdict and that which does not -- and to set aside the verdict if we conclude that it is so against the weight and preponderance of the evidence as to be clearly

> wrong and manifestly unjust, regardless of whether there is evidence of probative force to support it. This is the standard of review requested.

White v. State, supra, at 855. Though properly recognizing the question presented on appeal, and the requested standard of review, the Texas Court of Criminal Appeals affirmed the conviction, holding that it could not review the weight and preponderance of evidence of incompetence because its review was limited to questions of law.

Petitioner sought relief by writ of habeas corpus in the United States District Court for the Northern District of Texas. The District Court, confusing the issue, erroneously applied the standard of review announced in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), ordinarily use in cases in which the writ of habeas corpus is used to attack the sufficiency of a finding of guilt, an issue upon which the state is required to carry the burden of proof beyond a reasonable doubt. The District Court magistrate, relying upon Jackson v. Virginia, supra, ruled that it "should not substitute its findings of fact whether there is evidence in the record to support the factual determination made by the jury." Reviewing only the evidence which supports the verdict of competency, "in a light most favorable to the prosecution," the District Court stated that "[t]here is legally sufficient evidence upon which any rational finder of fact could have made the same findings as the jury in the competency trial found," and denied the petition for writ of habeas corpus. The District Court failed to engage in any independent federal fact finding concerning the Defendant's competence, did not review the Petitioner's evidence of incompetence, and only looked to determine if there was some evidence to support an adverse jury verdict, rather than reviewing all the evidence in the case.

Petitioner appealed from the denial of the writ of habeas corpus to the United States Court of Appeals for the Fifth Circuit. On appeal Petitioner complained that "the District

Court denied Petitioner due process of law by erroneously applying the standard of review announced in Jackson v. Virginia, rather than reviewing the weight and preponderance of all the evidence of the Petitioner's incompetency." The Court of Appeals issued its certificate of probable cause, and, after oral submission, entered its judgment affirming the denial of writ of habeas corpus by the District Court.

The Court of Appeals properly recognized that "This appeal concerns the proper standard of review as applied to a state court jury verdict of competency prior to criminal proceedings." White v. Estelle, 669 F.2d 973 (5th Cir. 1982). The Court recognized that Petitioner's complaint was that the standard announced in Jackson v. Virginia was not a proper standard of review to be applied in reviewing the complaint of an adverse jury verdict in a state court criminal competency hearing. The Court recognized that "[t]he Jackson test grew out of the constitutional rule requiring proof beyond a reasonable doubt for a criminal conviction." The Court also noted that this case involves "a constitutionally grounded state burden of proof declaring that an accused is not to be subjected to a criminal trial if there is a demonstration of incompetence by a preponderance of the evidence before trial." White v. Estelle, supra, at 976. Having recognized the question presented by the appeal, and apparently implicitly recognizing that the standard of review of Jackson v. Virginia was not appropriate to the review of the adverse competency verdict in this case, the Court of Appeal proceeded to fashion a new standard of review for state court competency verdicts. Thereby, the Court of Appeals decided an important question of federal constitutional law which has not been, but should be settled by this court. The Court of Appeals stated the new standard of review as follows:

> Viewing the evidence in the light most favorable to the jury verdict, we must ask whether any rational trier of fact could conclude that the evidence does not predominate in favor of the appellant's claim of incompetency.

White v. Estelle, supra, at 977. The Court proceeded to apply this new standard to the facts of this case, rather than remand the case to the District Court for reconsideration in light of the newly established standard of review.

Petitioner contends that the Federal District Court and the Untied States Court of Appeals applied an erroneous standard of review, and denied him due process of law by the application of this erroneous standard. Rather than asking "whether any rational trier of fact could conclude that the evidence does not preponderate in favor of the Petitioner's claim of incompetence," the proper standard of review requires that the reviewing court consider all of the evidence -- that which supports the verdict and that which does not -- and to set aside the verdict that the reviewing court concludes that it is so against the weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, regardless of whether there is evidence of probative force to support it. Specifically, due process of law requires that the reviewing federal court engage in independent federal fact finding and apply a hard look to the ultimate conclusions of the District Court concerning the Petitioner's competency to stand trial, rather that merely determining whether "any rational trier of fact could conclude that the evidence does not predominate in favor of the Petitioner's claim of incompetence.

There are no prior decisions which specifically control or answer the question here presented. "Although threshold inquiries, the proper standards for the district and appellate courts to apply in federal competency hearings have received little attention and the Supreme Court has yet to speak directly to these points." United States v. Makris, 535 F.2d 899, 905 (5th Cir. 1976). And just as important to the decision of this case, the proper standards for the district and appellate courts to apply in review of state competency hearings has received little attention and this Court has yet to speak directly to that

point. United States v. Makris, supra, although instructive, involved the review of a federal competency hearing. "There can be no question that in federal criminal cases the Government has the burden of proving the Defendant competent to stand trial at the §4244 hearing or its nunc pro tunc substitute. U.S. v. Makris, supra, at 906; Conner v. Wingo, 429 F.2d 630 (6th Cir. 1970). But in the Texas courts the burden of proof is on the defendant by a preponderance of the evidence. Accordingly, Mackris is instructive but not controlling.

Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976), involved review by the Circuit Court of a federal district judge's findings in a nunc pro tunc competency hearing, rather than review of a state court jury verdict. Bruce v. Estelle, supra, did not decide the important federal question here presented, but is instructive of the proper standard of review. Bruce and Makris both involve the review of a trial judge's specific fact findings rather than review of an adverse jury verdict on competency in state court.

The District Court relied upon the standard of review announced in Jackson v. Virginia, supra. But Jackson v. Virginia does not decide the important question of constitutional law here presented.

> The Jackson test grew out of the constitutional rule requiring proof beyond a reasonable doubt for criminal conviction. . . . In this case, we have a constitutionally grounded state burden of proof to claim that an accused is not to be subjected to a criminal trial if there is a demonstration of incompetence by a preponderance of the evidence before trial.

White v. Estelle, 669 F.2d 973, at 976. The burden of proof in all criminal cases is upon the prosecution. Accordingly, in Jackson v. Virginia, supra, this Court, following the rule of In Re Winship, replaced the "any evidence" test of Thompson v. Louisville, 326 U.S. 199, 80 S.Ct.6 24, 4 L.Ed.2d 654 (1960), and ruled that "the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no

rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, supra, at 2792. In this case, the Court is reviewing a complaint upon which the Petitioner is required to carry the burden of proof by a preponderance of the evidence. Therefore, the question of constitutional magnitude presented by this case is not foreclosed or decided by Jackson v. Virginia.

In Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), this Court entertained an appeal from a Court of Appeals decision denying the federal writ of habeas corpus to a state court prisoner who had complained of an adverse jury verdict of his competency. Drope v. Missouri, supra, did not explicity state the proper standard of review to be applied by the federal district court nor the court of appeals when reviewing a complaint such as that here presented, but the Fifth Circuit Court of Appeals in Bruce v. Estelle, supra, read the Court's decision in Drope v. Missouri to require that the appeal court "take a hard look at the district court's ultimate determination, . . ." concerning the conclusion of competency. The Fifth Circuit in Bruce v. Estelle, supra, stated that

> [t]he standard announced in Makris for appellate review [of federal district court competency decisions] is equally applicable to appeals from the district court in habeas proceedings. As long as a federal court has initially engaged in independent fact finding, this court need not review de novo.

Bruce v. Estelle, supra, at 1058. The Fifth Circuit in Bruce v. Estelle, supra, clearly viewed the Court's decision in Drope v. Missouri and United States v. Makris as requiring independent fact finding and an identical standard of review in state and federal habeas petitions involving competency. "A different appellate standard for state habeas cases would compound the confusion in this already difficult area." Bruce v. Estelle, supra, at 1058. Petitioner in this case contends that the federal district court and the Court of Appeals failed to engage in independent federal fact finding. In Drope v. Missouri, the

State of Missouri contended that the Supreme Court should not reverse the judgment unless the state court competency verdict were shown to be "clearly erroneous". This Court declined to follow the "clearly erroneous" rule and stated that "In such circumstances we believe that it is 'incumbent upon us to analyze the facts in order that the appropriate enforcement of a federal right may be assured.'" Drope v. Missouri, supra, at 175, 95 S.Ct. at 905.

It seems clear from Bruce v. Estelle and United States v. Makris, as well as Drope v. Missouri,that at least in reviewing the decision of a federal district judge concerning a prisoner's competency, whether in a state or federal case, the Court of Appeals should engage in independent federal fact finding giving a hard look at the ultimate conclusion of competency. However, the question is still open concerning the proper standard of review for a complaint of an adverse jury verdict of competency presented by a state prisoner on petition for writ of habeas corpus.

Petitioner contends that the standard of review applied by the Court of Appeals and the District Court in this case is erroneous. The standard of review required by the due process clause is a function of the placement of the burden of proof by the state court. Because the Petitioner was required to prove his incompetence by a preponderance of the evidence, if he wants to complain of an adverse jury verdict, he is entitled to have independent federal fact finding to determine whether or not his evidence outweights or preponderates over the conflicting evidence of his competency. This requires review of all of the evidence in the case, that which supports the competency verdict and that which does not. The Petitioner's complaint is that his evidence of incompetency preponderates and outweights the adverse evidence. It would be a denial of due process, in reviewing such complaint to disregard and not consider the Petitioner's evidence and only consider the adverse evidence. However this is exactly

the process of review applied by the lower federal courts in this case. Drope v. Missouri, supra, requires independent federal fact finding and requires that the federal court "analyze the facts in order that the appropriate enforcement of federal right may be insured". Drope v. Missouri, supra, at 905. And, in fact, in the Drope case, this Court specifically engaged in the type of review requested by the Petitioner in this case, actually reviewing the weight and preponderance of all of the evidence in ruling upon Drope's complaint. In that case this Court stated that "We believe the Missouri courts failed to consider and give proper weight to the record evidence. Too little weight was given to the testimony of the petitioner's wife. . . ." Drope v. Missouri, supra, at 179, 95 S.Ct. at 907. (Emphasis added) Clearly, in the Drope case, without announcing the standard of review in question here, this Court nevertheless rejected the "clearly erroneous" standard of review, and proceeded to consider the relative weight and preponderance of conflicting items of evidence in that case. Therefore, the Supreme Court in Drope actually engaged in the process of standard review for which Petitioner contends.

In Bruce v. Estelle, supra, the Circuit Court reversed the district judge's nunc pro tunc finding of competency because "the evidence did preponderate in favor of finding Bruce incompetent, ..." Bruce v. Estelle, supra, at 1062. (Emphasis added). It is clear from reading the Bruce opinion that the Court of Appeals engaged in the standard review here requested, and actually weighed and considered all of the competing record evidence on competency, in order to determine that "the evidence did preponderate in favor of finding Bruce incompetent."

It would appear from a review of Bruce, Makris, and Drope v. Missouri, that the proper standard of review of a complained adverse jury verdict on competency by a state court prisoner, requires independent federal fact finding, and a hard

look at the conclusion of competency entered by a state court jury. Clearly, in Bruce and in Drope, the federal courts actually engaged in the standard of review here requested, including weighing and considering all of the record testimony to determine whether the evidence of claimed incompetency preponderated over conflicting evidence. The federal district court in this case failed and refused to grant the Petitioner independent federal fact finding, and, following the rule announced in Jackson v. Virginia, held that "the evidence adduced was legally sufficient to enable a rational trier of fact to make the same findings which the jury made." The federal district court clearly considered only the competing evidence presented by the State tending to show the Petitioner competent to stand trial. The district court wholly disregarded, and failed to review the Petitioner's evidence.

The Court of Appeals stated that "Viewing the evidence in the light most favorable to the jury verdict, we must ask whether any rational trier of fact could conclude that the evidence does not predominate in favor of the Petitioner's claim of incompetence." White v. Estelle, 669 F.2d 973 at 977. Clearly, this standard of review does not require the reviewing court to weight and consider all competing evidence of competency, and does not require de novo independent federal fact finding, nor a hard look at the ultimate conclusion of competency rendered by a state court jury. Clearly, this standard, fashioned after and imitating the standard announced in Jackson v. Virginia, does not require the reviewing court to engage in the process followed in Drope v. Missouri where the court considers the weight and preponderance of all the evidence concerning a defendant's competency, both pro and con. Petitioner contends that the application of this standard of review by the Court of Appeals and the Federal District Court denied him due process of law.

This standard of review announced by the Court of Appeals is completely inappropriate and inadequate to furnish due process of law when reviewing a complaint of an adverse jury verdict of competency. In such a case, due process requires that the reviewing court consider all of the evidence to determine its weight and preponderance. It is fundamentally unfair to refuse to consider the Petitioner's evidence after having placed the burden of proof on the Petitioner by a preponderance. It is not possible to determine preponderance of evidence without comparing competing evidence. The word "preponderance" implies and imports a comparison of competing items of evidence to determine the relative weight and preponderance, and the inferences required by that evidence. It would be fundamentally unfair to consider only adverse evidence in reviewing the question of whether or not supporting evidence predominates and preponderates toward a certain conclusion.

II.

THE VERDICT OF COMPETENCY IS CONTRARY TO THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE AND RESULTED IN APPELLANT'S CONVICTION WHILE INCOMPETENT, IN VIOLATION OF DUE PROCESS OF LAW.

There was a competency hearing in this case, in which the Petitioner asserted that he was incompetent to stand trial according to the standards of Article 46.02 of the Texas Code of Criminal Procedure. At that hearing, Petitioner and his counsel contended that he suffered from a psychosis of long standing duration, specifically, schizophrenia. Counsel asserted that this psychosis evidenced itself in symptoms of visual and auditory hallucinations of a deceased girl friend and grandmother, and that these hallucinations directed the Petitioner not to cooperate with his attorneys in trial of the case. The jury in the competency hearing returned a verdict that the Petitioner was competent to stand trial (Tr. 149). Petitioner here contends that the verdict of the jury in this

competency hearing was contrary to the great weight and preponderance of the evidence which showed him to be an incompetent psychotic who lacked a rational as well as a factual understanding of the proceedings against him, and who was unable to consult with his lawyers with a reasonable degree of rational understanding. Petitioner's subsequent conviction of the offense of capital murder at a time when he was incompetent constitutes a denial of due process in violation of the 14th Amendment to the Constitution of the United States. Bishop v. U.S., 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956), Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

Petitioner's EVIDENCE

As due process requires review of all of the evidence to determine its weight and preponderance, Petitioner will review the evidence on the issue of his competence, in light of the legal standard established by Article 46.02 of the Texas Code of Criminal Procedure. The Code provides that

> A person is incompetent to stand trial if he does not have:
>
> > (1) Sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or
> >
> > (2) A rational as well as factual understanding of the proceedings against him.
>
> TEX. CODE CRIM. PROC. ANN. art. 46.02(1)(a)(1977).

At the competency hearing Petitioner introduced testimony tending to prove himself incompetent under both standards of Article 46.02(1). He presented the testimony of two clinical psychologists and a psychiatrist plus the lay testimony of a jail visitor, and the testimony of his defense counsel. In addition, Petitioner presented exhibits from the Federal Medical Center for federal prisoners in Springfield, Missouri, and medical records of his treatment in the Lubbock County jail. The State presented the testimony of a neurologist and radiologist, the testimony of a jail captain, and the testimony of a deputy sheriff.

The expert witnesses for the Petitioner were particularly well qualified to test for, diagnose and render opinions on the issue of mental incompetence. The training, and experience of Drs. Keller and Mahone in analyzing motivation for human conduct clearly requires that their opinions be accorded great weight as practicing psychologists. See Hogan v. State, 496 S.W.2d 594 (Tex. Crim. App. 1973). Texas courts have long considered that, "of those qualified to give an opinion, superior to that of a layman, would be a practicing psychologist." Watson v. State, 161 Tx. Crim. 5, 273 S.W.2d 879, 882 (Tex. Crim. App. 1954). In the Hogan case, the Court of Criminal Appeals specifically ruled that a clinical psychologist was qualified to express an expert opinion on competence because of his skill, training and experience in analyzing motivation for human conduct. Therefore, the opinions of Drs. Keller and Mahone, practicing clinical psychologists, should be accorded great weight. Dr. Richard Weddige, a practicing psychiatrist with superlative credentials and experience, testified that the Petitioner was incompetent. His professional opinion as a psychiatrist carries great weight on the issue of competency. The Texas Court of Criminal Appeals has also stated that "a psychiatrist is certainly best qualified to pass upon a question of mental illness." Watson v. State, supra, at 882.

After an examination in July of 1975, Dr. Keller diagnosed the Petitioner as "psychotic" (S.F. 316, 320, 336) with "schizophrenia" (S.F. 320) and "organic brain syndrome" (S.F. 336); (Ex. Vol. 040). Three months later, Dr. Mahone found the Petitioner to be "chronically psychotic, probably schizophrenic" (S.F. 360) with "organic brain syndrome" (Ex. Vol. 003). In September of 1975, Dr. Weddige, the psychiatrist, diagnosed the Petitioner as "chronically psychotic" (S.F. 227); (Ex. Vol. 135) with a "schizophrenic" psychosis (S.F. 227); (Ex. Vol. 935). A year later, in September of 1976, Dr. Weddige found the Petitioner's condition unchanged, diagnozing him "psychotic . . .

chronic" (Ex. Vol. 037), "for at least seven to eight years" (Ex. Vol. 037). In January of 1977, immediately prior to the competency hearing, and after a conversation of the Petitioner outside the hearing room, Dr. Weddige reaffirmed his opinion that the Petitioner was suffering from "schizophrenia, chronic . . . undifferentiated type" (S.F. 295). The evidence shows five independent diagnoses over an eighteen month period from three well qualified psychiatric and psychological experts trained to detect mental disorders. Not only did the State fail to produce contradictory evidence on this point, it failed to impeach the credibility of these experts. Clearly, the consistent finding of severe mental disorder of a permanent nature is weighty evidence which preponderates in favor of the Petitioner.

More important to this application, these experts concurred in finding that the Petitioner was not only "psychotic" and "schizophrenic" but also incompetent to stand trial under the legal standard of Article 46.02. Dr. Weddige characterized the Petitioner as "out of contact with reality" (S.F. 227), "totally impaired" (S.F. 261), with "a condition (which) could impair him from defending himself or representing himself legally and consulting with his attorney." (S.F. 258); (Ex. Vol. 035). Dr. Keller testified that he found the Petitioner to be "incompetent" (S.F. 342), adding that the Petitioner's hallucinations added to distrust for his attorneys (S.F. 331). Dr. Mahone concurred that he was "unable to consult with his lawyers and to promote his case on a reasonable basis" (S.F. 365). Even Petitioner's trial counsel took the stand to explain his difficulty in communicating rationally with the Petitioner due to the Petitioner's hallucination and his refusal to cooperate (S.F. 379, 387). After independent interviews and testing over an extended period of time, each expert concluded that the Petitioner's irrational thought patterns prevented him from presently consulting with his attorneys with a rational understanding, and that he did not have a rational understanding of the proceedings against him. Thus,

the Petitioner was incompetent under both of the standards of Article 46.02. Upon cross-examination by the State, Dr. Weddige, demonstrated that he had given deliberate, careful consideration to the statutory standard of incompetence. While testifying that the Petitioner had a factual understanding of the proceedings against him, (Article 46.02)(1)(a)(2) Dr. Weddige firmly and repeatedly testified that the Petitioner lacked the rational understanding required by the statute (S.F. 268).

In determining whether the Petitioner was competent to stand trial it is important to consider the specific effect of his psychosis. The most weighty evidence on this issue is the Petitioner's auditory and visual hallucinations (Ex. Vol. 003, 040). According to the written reports of the Petitioner's experts, the Petitioner began reporting these hallucinations soon after the accidental death of his girl friend, Beverly, in 1972 (Ex. Vol. 028; 015, 019, 002, 034, 035, 036, 037). The hallucinations concern "two people he frequently sees and who frequently talk to him" (S.F. 221). His deceased maternal grandmother "appears" to the Petitioner directing him to "read the Bible and be good" (S.F. 221, 311, 333); (Ex. Vol. 034, 039). The other person is the deceased Beverly, who "seems to be active on almost a day to day basis and directing Petitioner's actions and thinking. "He seeks her out. . . he sees her and then she tells him what to do and what not to do. . . also at times, almost predicts . . .for him what is going to happen." (Ex. Vol. 035) (S.F. 222) She also directs him to commit acts of violence (S.F. 333). At the LaTuna Federal Penitentiary, Beverly "directed the Petitioner to kill another inmate" (Ex. Vol. 034, 036). She also warned the Petitioner to be suspicious of two members of the jury in the competency hearing (S.F. 224). The dual character of these hallucinations, reflecting the good and bad sides of the personality, and the tendency to find someone else to blame, are both indicative of schizophrenia (S.F. 342, 345). The most important thing about this weighty evidence is

that these hallucinations directly interfered with the Petitioner's consultation with his attorneys. Defense counsel took the stand to explain that early in the case, the Petitioner "again had a vision from Beverly and Beverly told him not to do what we asked him to do, and he has refused to cooperate since then based on that hallucination." (S.F. 391) The expert testimony was consistent with counsel's perception. Dr. Mahone testified that

> "He reported to me that she told him to be suspicious of the help and advice he was getting from his lawyers because there was some type of collusion between the lawyers, the medical doctors, and the court system, . . . which would not permit him to have a fair trial." (S.F. 354) (Ex. Vol. 002)

Dr. Keller testified that "the voice would give him some kind of advice about consulting with his attorneys. . . . something to the effect that perhaps they could not be trusted." (S.F. 312) Dr. Keller found the Petitioner's attitude to be distrustful of his attorneys (S.F. 331). Certainly, a defendant's refusal to cooperate with appointed counsel may not be unusual and certainly is not in itself evidence of incompetency. However, when that refusal of cooperation results from visual and auditory hallucinations resulting from paranoid schizophrenia, then the Petitioner is prevented from consulting with his lawyer "with a reasonable degree of rational understanding" by the psychosis itself.

The Petitioner often complained of headaches, and these headaches seemed to precede his visual and auditory hallucinations (Ex. Vol. 002, 029). His complaints of headaches appeared on the jail records while he was in custody in this case. He was repeatedly treated with medicine for headaches, including tylenol, and dilantin, an anti-convulsive drug for headaches. Petitioner complained of headaches and hallucinations to Petitioner's witness, Mrs. Nemec. The Petitioner called these headaches "migraines." Of course, these are the subjective reports of the Petitioner himself, but they arose prior to the competency hearing. However, Dr. Gordon, the State's expert

neurologist, testified that the Petitioner's electroencephalogram was consistent with migraine headaches. This expert neurological testimony confirms and lends weight to the subjective report of the Petitioner. It is particularly significant, in light of the fact that Dr. Weddige testified that the migraines often preceded the visual and auditory hallucinations, and the fact that these headaches (and presumably, the accompanying hallucinations) occurred on a regular basis all during the time the Petitioner was in custody in the Lubbock County jail on this charge.

The impressive battery of psychological tests administered to the Petitioner by the experts in this case served as the basis for and corroborated the expert findings of incompetence (Ex. Vol. 002, 039). Each of the tests administered is recognized by those in the field of psychology as being an accurate instrument measuring different aspects of mental competence. Further, the Petitioner's expert psychological and psychiatric witnesses were each shown to be qualified to administer the tests and qualified to interpret the test results. Dr. Keller administered the Wechsler Adult Intelligence Test (WAIS) (S.F. 304), measuring intelligence; the Rorschach Test, measuring how a subject presents himself to others (S.F. 305); the Minnesota Multiphasic Personality Inventory, measuring personality (S.F. 306); and the Memory for Design Test and Bender- Gestault Test, measuring visual-motor system (S.F. 306). Dr. Mahone administered the WAIS Vocabulary Subtest, measuring verbal IQ (S.F. 349); the Revised Beta Intelligence Test, measuring non-verbal IQ (S.F. 349); the Rorschach, measuring personality (S.F. 350); the MMPI, measuring personality (S.F. 350); and the Berry Test of Visual Motor Integration, measuring the visual-motor system (S.F. 350). Dr. Gordon administered several neurological tests, testing the reflexes (S.F. 410), the plantar responses and motor function (S.F. 412) and an electroencephalogram (EEG) (S.F. 406). Dr. Tustin, the

radiologist, administered two radiological tests, the Skull series X-rays (S.F. 429) and the brain scan (S.F. 425, 436).

The findings on these tests were uniformly consistent with the paranoid schizophrenia (S.F. 362). The several IQ tests rated the Petitioner as a borderline retardate, (S.F. 355), (Ex. Vol. 002, 039), in the lower three per cent of the adult population (S.F. 355); (Ex. Vol. 002). The EEG revealed "a few posterior waves bilaterally" (S.F. 406), a reading which the State's expert admitted is consistent with the Petitioner's complaints of migraine headaches which preceded his hallucinations (S.F. 417). Only the secondary diagnosis of organic defect (S.F. 341) was rebutted by the neurological and radiological tests; however, measuring personality (S.F. 350); the MMPI,masuring personality (S.F. 350); and the Berry Test of Visual Motor Integration, measuring the visual-motor system (S.F. 350). Dr. Gordon administered several neurological tests, testing the reflexes (S.F. 410), the plantar responses and motor function (S.F. 412) and an electroencephalogram (EEG) (S.F. 406). Dr. Tustin, the radiologist, administered two radiological tests, the Skull series X-rays (S.F. 429) and the brain scan (S.F. 425, 436).

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in diameter. And, of course, mental illness will not show up on an x-ray (S.F. 441). The sophisticated battery of tests administered to the Petitioner by his expert witnesses tested virtually every aspect of mental capacity, and supported and corroborated the expert opinions that the Petitioner was incompetent. The electroencephalogram administered to the Petitioner by the State's expert neurologist confirmed his complaint of migraine headaches which preceded his hallucinations. The expert testimony of the State's witnesses, the neurologist and the radiologist, were able to rule out only organic damage of greater than one inch in diameter, and did not in any way rebut or impeach the opinion of the psychologists and psychiatrists.

In spite of the weighty evidence of the Petitioner's experts, and the supporting weighty evidence of objective and accepted standardized tests, the State repeatedly suggested that the Petitioner was merely feigning his incompetence in order to avoid legal responsibility (S.F. 255, 390). However, the objective tests administered by the psychological and psychiatric experts, and the testimony of such experts, clearly discredits this State theory. Having completed only the 5th grade (Ex. Vol. 034, 039), the Petitioner lacks the educational background to deceive two trained Ph.D. psychologists and a psychiatrist specifically trained to detect feigned responses (S.F. 312-313). More importantly, Petitioner is mentally retarded, testing at a 70 IQ level, placing him in the lower three per cent of the adult population (S.F. 277, 311, 355) (Ex. Vol. 002). He was clearly no mental match for the experts who examined him. Even the objective tests administered to the Petitioner are specifically programmed to detect feigned responses (S.F. 334). The evidence shows clearly "that this is not a case where the question of the Petitioner's mental condition was asserted for the first time after. . . the commencement of a criminal prosecution under circumstances that might suggest the defense is a self-serving afterthought to avoid legal responsibility." See, Kemp v. State,

61 Wis. 2d 125, 211 N.W. 2d 793 (1973). Rather, the testimony of Dr. Weddige shows that this man had been chronically psychotic for seven to eight years (Ex. 037).

A presumption of incompetence arises upon a showing of a prior adjudication of a defendant's incompetency, thus shifting the burden to the State to prove the defendant incompetent to stand trial. Nichols v. State, 501 S.W.2d 333 (Tex. Crim. App. 1973). While there is no prior adjudication of incompetency in this case, the facts, including long standing nature of the Petitioner's psychosis, and his institutionalization for that reason, should carry great weight even it if does not rise to the level of presumption of incompetency. While the Petitioner was never adjudged insane, he was, nevertheless, treated for psychosis, in the Medical Center for federal prisoners, in Springfield, Illinois, and in the Lubbock County jail. He was administered major tranquilizers, which are used to treat psychosis. While in the LaTuna Federal Penitentiary, the Petitioner was referred to the Medical Center for federal prisoners on a psychiatric referral and treated for mental illness. This treatment occurred at a time long prior to the offense alleged in this case. The Petitioner's hallucinations about his deceased girl friend and grandmother began as early as 1972. While these facts do not prove an adjudication of incompetence, they do reflect a long standing psychosis of a permanent nature, resulting in institutionalization in the federal medical facility on a psychiatric referral, and not "a self-serving afterthought to avoid legal responsibility."

The Wisconsin Supreme Court recently adopted this viewpoint in reversing a conviction for first degree murder where the facts were remarkably similar to this case. In Kemp v. State, 61 Wis. 2d 125, 211 N.W.2d 793 (1973), the Wisconsin court stated that:

> The record clearly reveals that this is not a case where the question of the defendant's mental condition was asserted for the first time after . . .the

> commencement of a criminal prosecution under circumstances that might suggest the defense is a self-serving afterthought to avoid legal responsibility. On the contrary, it appears without dispute that for at least four years prior to the event the defendant did have some mental or emotional problems.

Kemp v. State, supra, at 798, 799. In Kemp, the Petitioner appealed an adverse jury verdict in a pre-trial insanity hearing. In that case the defendant had completed the 11th grade and had a "high or over average intelligence;" in this case, the Petitioner completed the 5th grade, and is a borderline retardate with a 70 IQ placing him in the lower three per cent of the population. In the Kemp case, as in this case, three psychiatrists, one for the Defendant and two court appointed, testified that the Petitioner was clearly insane at the time of the shooting, while the psychiatrists for the State refused to give their opinions on the issue; in this case, the State's expert witnesses, the neurologist, Dr. Gordon, and the radiologist, Dr. Tuston, were not even asked their opinion as to the competence of the Petitioner to stand trial. After considering the evidence as a whole, the court in the Kemp case concluded that the evidence "predominates quite heavily on the side of the defendant on the issue of mental responsibility." Kemp v. State, supra, at 799.

The evidence here more conclusively supports a similar finding in this case. Unlike Kemp, the Petitioner in this case is educationally and mentally retarded (S.F. 311, 316, 355); (Ex. Vol. 034). Unlike Kemp, experts in psychology and psychiatry testified that this Petitioner is incompetent (S.F. 258, 234, 265, 379, 387); (Ex. Vol. 003, 035, 037, 040); while the State's experts did not address the issue of competence. Yet, like the defendant in the Kemp case, this Petitioner has a long history of psychosis. In 1972 the physician in the Springfield Medical Center for federal prisoners noted that the Petitioner almost hit others, that he could not get along well with people (Ex. Vol. 030); Dr. Keller noted that when the Petitioner gets angry that he hits people (S.F. 311), and becomes angry (Ex. Vol. 039). Dr.

Gordon, the State's witness, corroborated this diagnosis and that the Petitioner's EEG revealed evidence of irritability (S.F. 417).

Psychiatric medication prescribed for the Petitioner provides additional evidence of his longstanding mental disturbance. Thorazine and stelazine are recognized by experts as major tranquilizers for major psychosis (S.F. 220, 419). Stelazine was prescribed for Petitioner at the Medical Center for federal prisoners in Springfield for the Petitioner (Ex. Vol. 015, 017, 019, 020) and even at the Lubbock County jail prior to the hearing (S.F. 467); (Ex. Vol. 061). Thorazine was prescribed for him at Springfield in 1972 (Ex. Vol. 030). Dr. Gordon identified dilantin as an anti-convulsant used for treating headaches (S.F. 419). This strong medication was administered to the Petitioner at the Lubbock County jail in late 1976 (Ex. Vol. 061). This is further evidence of the Petitioner's complaint of headaches preceding hallucinations. Finally, Petitioner has long complained of hallucinations directing his behavior. The assault at LaTuna Federal Penitentiary was the result of an hallucination in 1972 (Ex. Vol. 030). The Petitioner reported these hallucinations at Springfield (Ex. Vol. 015, 019, 020) and he described the hallucinations to the experts and lay persons alike, Dr. Weddige, (S.F. 222) (Ex. Vol. 034, 037), his attorney (S.F. 391), and a visitor to the jail (S.F. 374).

As proper adjudication of the weight and preponderance of evidence requires the Court to review all of the evidence in the record, Petitioner will now summarize the testimony presented by the State's medical witnesses. In this case, as in any other criminal case, the credibility of an expert witness and the weight to be given his testimony, as contrasted to other witnesses, is always an issue that is properly before the jury. And, probably, "the most effective method available to challenge the credibility of an expert witness and the weight of his testimony is through another expert." Kemp v. State, supra, at

798. However, analysis of the evidence as a whole reveals that the State witnesses failed to contradict prior expert testimony presented by the Petitioner. The State's medical witnesses failed altogether to address the crucial issue of competency itself.

The Texas Court of Criminal Appeals has long recognized hierarchy of expert opinions in the field of mental illness. Watson v. State, supra. While the Court accepts opinions of general practitioners and physicians in other specialties, common sense requires that greater weight be given to competing opinions from experts specifically trained to detect and treat mental and should not be considered to reduce the weight, credibility or preponderance to be accorded the prior testimony recording the Petitioner's incompetence.

The most persuasive argument for discrediting the State's expert testimony comes from a conspicuous omission in the record itself. The State's experts never gave their qualified opinions whether the Petitioner was competent to stand trial. The State never asked the question crucial to the entire hearing. They never denied that Petitioner is psychotic. While the State did not bear the burden of proof to prove the Petitioner competent, the testimony of Dr. Gordon and Dr. Tustin is clearly insufficient to prove that the Petitioner was competent to stand trial. Petitioner contends that the State's expert medical testimony deserves to be accorded little weight on the issue of competence.

Likewise, the State's lay testimony fails to diminish the weight to be accorded the expert testimony showing the Petitioner's incompetence. While the testimony of the jailer, Francis Cox and Deputy Sheriff, Alton Hobbs, is admissible on the issue of competence, their testimony is subject to impeachment because of their limited opportunity to observe the Petitioner, and their lack of training, experience and qualification in diagnosing mental disease or defect. Even though the witness Cox

observed the Petitioner from time to time in the county jail over a period of several months, his observation was limited to the social interaction of the Petitioner with his peers. Such superficial encounters require little emotional competence; even mentally retarded psychopaths may be able to appear normal in such a setting. However, the Petitioner's consultation with his attorney concerning the abstract principles of law, and distant and obscure recollection of facts, obviously requires a much higher degree of competence. Both jailer Cox and Deputy Hobbs admitted that they had had no opportunity to observe the Petitioner during consultation with his attorney (S.F. 460, 484). Certainly, if the witness was unable to observe the Petitioner consulting with his attorney, the witness had a severely limited opportunity to determine whether or not the Petitioner was capable of consulting with his attorney with a rational understanding.

Jailer Francis Cox described the Petitioner as "about like the rest of them (other prisoners), normal." (S.F. 471) His demeanor and appearance did not differ from other prisoners on the cell block (S.F. 472). This, of course, is consistent with the flat affect which Dr. Weddige describes as a symptom of psychosis (S.F. 225). Deputy Hobbs observed but did not listen to the Petitioner's brief conversations with psychologists and psychiatrists in the courtroom (S.F. 481), and stated only that "both (parties) were talking back and forth" (S.F. 482), with both parties contributing to what was said. (S.F. 481-482) The lay testimony was in essence merely that the witnesses observed nothing abnormal in Petitioner's social interaction with other persons. In weighing all evidence adduced at the hearing, logic demands that there should be greater weight accorded a clinically based assertion of incompetence, based upon clinical interviews and tests, administered by trained qualified experts, than to the unqualified opinion of the lay witnesses that the Petitioner was

observed in normal conversation with his peers at times irrelevant to, and unrelated to, consultation with his attorney.

While defense expert testimony may be rebutted by personal opinions of laymen, "some reason must be objectively present for ignoring expert opinion testimony which is sought to be rebutted only by the observations of laymen." Brock v. U.S., 387 F.2d 254, 257 (5th Cir. 1967). Petitioner contends that there is no reason "objectively present for ignoring expert opinion testimony" in this case. Nothing said by Dr. Gordon or Dr. Tustin, or the two lay witnesses, refuted the fact that the Petitioner is a schizophrenic psychotic. The State's medical experts expressed absolutely no opinion as to competence, so their testimony furnishes no reason for ignoring the expert testimony presented in behalf of the Petitioner. Although Jailer Cox and Deputy Hobbs expressed the opinion that the Petitioner was normal and capable of talking with his attorneys, their opinion should be accorded very little weight on the issue of competence, and should not furnish sufficient reason to ignore the expert opinion of Dr. Keller, Mahone and Weddige. Watson v. State, supra.

The United States District Court for the Northern District of Texas, in an opinion later affirmed by the Court, has held that although lay testimony is admissible, it alone is not a sufficient basis upon which to support a verdict on competence. Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964). That case involved a federal writ of habeas corpus arising from a Texas conviction for robbery. The Court in that case reversed the verdict of competence in the State court proceeding because of undue reliance on lay testimony. Analogyzing the Petitioner's insanity hearing to a civil commitment proceeding, the court cited Article I, Section 15a of the Texas Constitution. "No person shall be committed as a person of unsound mind except on competent medical or psychiatric testimony." The court in Bush v. McCollum stated that "while this provision of the

constitution relates to civil actions, there is even more reason to hold lay evidence insufficient in a criminal case to send a man to the penitentiary for life." Bush v. McCollum, supra, at 563. The Court in Bush v. McCollum ruled that a doctor was not factually competent to give an opinion as to the sanity of the accused, where the doctor was a general practitioner with no specialized training in psychiatry. On appeal, this Fifth Circuit Court of Appeals affirmed the District Court judgment and opinion. McCollum v. Bush, 344 F.2d 672 (1965). In affirming the judgment of the District Court, this Court stated

> [u]pon careful consideration, we find ourselves in agreement with nearly all of the thorough and able opinion of the District Judge. While we think that the opinion of a general medical practitioner as to sanity is admissible, it seems clear to us, under the facts and circumstances of this case, that in adjudicating Bush guilty and sentencing him to life imprisonment without any psychiatric testimony, the State denied Bush both a fair trial and the effective assistance of counsel.

McCollum v. Bush, 344 F.2d 672 (1965). The opinion of the District Court and this Court of Appeals in the Bush case is particularly persuasive and close in point upon the admissibility and weight of the testimony of doctors who are not psychiatrists. Dr. Gordon and Dr. Tustin neither are psychiatrists, but for the purposes of this appeal, represent merely general practitioners engaged in specialties other than psychiatry. "A doctor, with such training and experience, is not factually competent to give an opinion as to sanity", Bush v. McCollum, supra, at 563, and, in fact, neither of these doctors expressed an opinion as to the Petitioner's competence.

In Brock v. United States, 387 F.2d 254 (5th Cir. 1967), this Fifth Circuit Court of Appeals held that the testimony of three laymen who had limited opportunity to observe the Petitioner, was insufficient to rebut the opinion of insanity expressed by a skilled psychiatrist, whose opinion was in no way impugned or discredited. The Court stated that although expert testimony of psychiatrists may be rebutted by the personal

opinions of laymen, nevertheless, the opinions of experts may not be arbitrarily ignored. This Court stated that

> [a]though no precise standards for review have been enunciated, this court has said that some reason must be objectively present for ignoring expert opinion testimony which is sought to be rebutted only by the observations of laymen; otherwise, there is no issue for the jury.

Brock v. United States, 387 F.2d 254 at 257 (5th Cir. 1967). And see Brock v. United States, supra, n. 6, 7 & 8 at 257, and cases there cited. The Court in the Brock case specifically held that the testimony of the laymen offered to rebut the opinion of the psychiatrist did not pass appellate muster. Petitioner contends that there is no reason objectively present for ignoring the expert opinion testimony of Petitioner's doctors, and that therefore, under this Court's holding in Brock v. United States, supra, the Government's evidence is insufficient to rebut Petitioner's testimony, and insufficient to outweight or preponderate over the Petitioner's claim of incompetency. The testimony of the lay witnesses Cox and Hobbs was the only State's evidence tending to negate or rebut the Petitioner's claim of incompetence. Certainly, such testimony should carry less weight than the testimony of qualified experts, and case law requires that a verdict based solely upon such testimony must be reversed as a matter of constitutional due process.

WHEREFORE, PREMISES CONSIDERED, Petitioner, ROBERT LEE WHITE, prays this Honorable Court to issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BROWN, HARDING, FARGASON & BROWN
1601 Broadway
Lubbock, Texas 79401
(806) 763-9493

Attorneys for Petitioner,
Robert Lee White, By
Appointment

By Mike Brown
Mike Brown
Texas State Bar No. 03164750

CERTIFICATE OF SERVICE:

This is to certify that a true and accurate copy of the foregoing Petition for Certiorari has this 11th day of June, 1982, been mailed to the Honorable Mark White, Attorney General of Texas, at Austin, Texas.

Mike Brown

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-1087

U.S. COURT OF APPEALS
FILED
APR 15 1982
GILBERT F. GANUCHEAU
CLERK

ROBERT LEE WHITE,

Petitioner-Appellant,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee.

- - - - -

Appeal from the United States District Court for the
Northern District of Texas

- - - - -

ON PETITION FOR REHEARING

(April 15, 1982)

Before BROWN, GEE and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-4

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY - 5 1982
JOSEPH McELROY, JR., CLERK
By [signature] Deputy

No. 81-1087

D. C. Docket No. CA-5-80-078

ROBERT LEE WHITE,

Petitioner-Appellant,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN, GEE and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

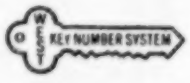
March 8, 1982

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By [signature] Deputy
New Orleans, Louisiana APR 26 1982

ISSUED AS MANDATE: APR 26 1982

1971) (defendant has no right to attend chamber's conference discussing admissibility of testimony); *Steiner v. United States*, 134 F.2d 931, 935 (5th Cir.), *cert. denied*, 319 U.S. 774, 63 S.Ct. 1439, 87 L.Ed. 1721 (1943) (same, arguments on trial motions). In *Lewis, supra*, the defendant was absent from four conferences in chambers between the trial judge and counsel. Two of these conferences involved evidentiary matters and two involved jury instructions. We concluded that "none of the four meetings referred to was a stage of the trial which required the accused's presence," and held that his absence did not violate either Fed. R.Crim.P. 43 or our earlier decision in *McKissick*. *United States v. Lewis, supra*, 420 F.2d at 687. *Lewis*, not *McKissick*, is controlling here and requires us to reject appellant's claim that he was denied the right to attend every stage of his trial.

The judgment of the district court is AFFIRMED.



Robert Lee WHITE, Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas Department of Corrections, Respondent-Appellee.

No. 81-1087.

United States Court of Appeals, Fifth Circuit.

March 8, 1982.

Rehearing Denied April 15, 1982.

Petition for habeas corpus was brought, challenging sufficiency of jury's finding of petitioner's competence to stand trial and sufficiency of corroborative evidence to support capital murder conviction. The United States District Court for the Northern District of Texas, Halbert O. Woodward, Chief Judge, denied habeas relief, and petitioner appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) although state's expert testimony did little, if anything, to negate petitioner's expert testimony of incompetence, in view of lay witnesses called and cross-examination of petitioner's experts, evidence viewed in light most favorable to jury verdict was sufficient to support conclusion that petitioner failed to show his incompetence by preponderance of evidence, and (2) there was sufficient corroborative evidence, including evidence of tire tracks and eyewitness testimony, that tended to support contents of petitioner's confession so that circumstantial evidence, together with confession, was sufficient to support capital murder conviction.

Affirmed.

1. Habeas Corpus ⇐25.1(3)

Petitioner's challenge to sufficiency of jury's finding of competency to stand trial stated cognizable claim for habeas relief.

2. Habeas Corpus ⇐113(12)

On appeal from denial of habeas corpus on petitioner's challenge to sufficiency of jury's finding of competence to stand trial, Court of Appeals had to ask, viewing evidence in light most favorable to jury verdict, whether any rational trier of fact could conclude that evidence did not predominate in favor of petitioner's claim of incompetence. Tex.Vernon's Ann.C.C.P. art. 46.02, §§ 1(a, b), 2(a).

3. Mental Health ⇐434

Jury was not bound by medical experts' application of legal standards to arrive at competency conclusion, since such was ultimately their task.

4. Mental Health ⇐434

Cases pitting lay and expert testimony against each other on issue of defendant's competency to stand trial turn on their particular facts.

5. Mental Health ⇐434

Although state's expert testimony did little, if anything, to negate defendant's

expert testimony on incompetence, in view of lay witnesses called and cross-examination of defendant's experts, evidence viewed in light most favorable to jury verdict was sufficient to support conclusion that defendant failed to show his incompetence by preponderance of evidence. Tex. Vernon's Ann.C.C.P. art. 46.02, §§ 1(a, b), 2(a).

6. Homicide ⇐250

Sufficient corroborative evidence, including evidence of tire tracks and eyewitness testimony, tended to support content of defendant's confession such that circumstantial evidence, together with confession, was sufficient to support capital murder conviction beyond reasonable doubt.

Robert M. Brown, Court-appointed, Lubbock, Tex., for petitioner-appellant.

Mark White, Atty. Gen., Gerald C. Carruth, Asst. Atty. Gen., Austin, Tex., for respondent-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, GEE and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

This appeal concerns the proper standard of review as applied to a state court jury verdict of competency prior to criminal proceedings. Appellant White was convicted of capital murder by a Texas state court and sentenced to life imprisonment. He was afforded a competency hearing before trial pursuant to Tex.Code Crim.Pro. art. 46.02 (Vernon). A jury found White competent to stand trial, and the Texas Court of Criminal Appeals affirmed White's conviction but held that it could not review the sufficiency of the evidence of incompetence because its review was limited to questions of law. *White v. State*, 591 S.W.2d 851, 856 (Tex.Crim.App.1979).[1]

White then sought relief by writ of habeas corpus in federal district court. That court denied habeas relief and adopted the opinion of the Texas Court of Criminal Appeals. On White's challenge to the sufficiency of the jury's finding of competence, the district court, after a review of "all the evidence," stated:

> The issue presented ... is whether the testimony from the psychiatrist and the two clinical psychologists, each of whom examined the petitioner on three occasions, greatly predominates to show that petitioner was incompetent to stand trial and that the testimony adduced by the prosecution from lay witnesses who had occasion to observe petitioner on a frequent basis was not adequate to negate

1. Specifically, the Texas Court of Criminal Appeals cited a Texas constitutional provision, then applicable to courts of civil appeals, art. V, § 6, which states in part: "Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error ...." The court then stated, 591 S.W.2d 856:

> After an examination of the constitutional and statutory provisions relating to the jurisdiction of the Court of Criminal Appeals, we conclude that this court has no fact jurisdiction as do the courts of civil appeals, and cannot "unfind" a vital factfinding by a jury. Since we do not have a jurisdiction to pass upon the great weight and preponderance of the evidence, appellant's contention is overruled.

The court of criminal appeals noted, however, that White "does not contend there is not some probative evidence in support of the verdict," *id.* at 854, and further observed that:

> What appellant is asking this court to do is to consider all the evidence—that which supports the verdict and that which does not—and to set aside the verdict if we conclude that it is so against the weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, regardless of whether there is evidence of probative force to support it.

Id. at 855. By its approving citation of Calvert, *"No Evidence" and "Insufficient Evidence" Points or Error*, 38 Tex.L.Rev. 361 (1960), we believe that the court indicated its approval of the rule that a mere scintilla of evidence constitutes no evidence and that it will and does review the testimony to determine if the verdict is supported by more than a scintilla of evidence. *See id.*, 38 Tex.L.Rev. at 363-65. *See also, e.g., Easley v. State*, 529 S.W.2d 522 (Tex.Crim.App.1975).

or rebut petitioner's claim of incompetence. The jury answered special issues adverse to petitioner's position. The evidence adduced was legally sufficient to enable a rational trier of fact to make the same findings which the jury made.

White appeals from the denial of habeas relief. We affirm.

White was afforded a competency hearing in accordance with *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) (due process compels a hearing on competency when facts or events at trial raise a bona fide doubt as to the defendant's competence; it is denial of due process to try an incompetent on a criminal charge). Under Texas law, the issue of competency to stand trial is determined in advance of trial on the merits where there is evidence to support a finding of incompetence. Tex. Code Crim.Pro. art. 46.02 § 2(a) (Vernon). A person is deemed incompetent to stand trial if the accused does not have

> (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against him.

Id. § 1(a). A defendant is "presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence." *Id.* § 1(b).

White does not challenge either the constitutionality of Texas' definition of competence or the constitutionality of its procedures for a competency hearing. White's claim of error is substantive, not procedural.[2] His dispute is with the jury verdict of competence, and he urges this court to review all the evidence presented in the state court proceeding in order to decide de novo whether he proved his incompetence by a preponderance of the evidence.

[1] White's claim clearly states a cognizable claim for habeas relief. As this court has recently pointed out,

> . . . a criminal defendant enjoys the fundamental substantive guarantee of not being tried if he is unable to "consult with his lawyer with a reasonable degree of rational understanding" or if he does not possess "a rational as well as a factual understanding of the proceedings against him."

Acosta v. Turner, 666 F.2d 949, 954 (5th Cir. 1982), (quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). The right to raise this substantive constitutional right in post-conviction proceedings has been recognized in federal courts since long before *Pate v. Robinson, supra*. *See Nathaniel v. Estelle*, 493 F.2d 794, 796 (5th Cir. 1974).

White's plea for de novo review is based on *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973), *on appeal after remand*, 536 F.2d 1051 (5th Cir.), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1976). *Bruce I* was a habeas proceeding in which this court found that due process was not satisfied by the post-conviction proceeding to determine competence afforded in that case. Accordingly, we remanded for a "full and meaningful" hearing that would not employ the *M'Naughton* rule as the controlling standard to determine competency. The district court, on remand, conducted a *nunc pro tunc* competency hearing, and the trial judge concluded that the accused could assist in his own defense, could rationally understand the proceedings against him, and was therefore competent. *Bruce II*, on appeal from the remand, reversed the trial judge's determination of competency. On the applicable standard of review, the court stated:

> As enunciated in [*United States v. Makris*, 535 F.2d 899 (5th Cir.), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1598, 51 L.Ed.2d 803 (1976)], this second stage determination of legal incompetency is subject to a review more stringent than the clearly erroneous rule. To insure protection of valuable constitutional rights, this court is bound to take a hard look at the ultimate competency "finding."

536 F.2d at 1059–60.

United States v. Makris guides our inquiry. In that case we pointed out that:

2. *See, e.g., Acosta v. Turner*, 666 F.2d 949, 954 (5th Cir. 1982).

> The question of competency, of course, is a mixed question of law and fact which has direct constitutional repercussions. It thus would be improper for a federal court to give conclusive weight to a state court finding of competency without reanalyzing the facts.

535 F.2d at 907. We also noted that in *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the Supreme Court had emphasized that competency should not be cast in an operative fact mold and thus insulated from constitutional adjudication.[3] What this means, according to the *Makris* court, is that:

> ... we should take a hard look at the trial judge's ultimate conclusion and not allow the talisman of clearly erroneous to substitute for thorough-going appellate review of quasi-legal issues.... We stress, however, that we by no means adopt the requirement of a de novo review. We say no more than that the clearly erroneous rule is to be limited to its proper sphere. It is not to be discarded.

535 F.2d at 907.

[2] Both *Bruce v. Estelle* and *United States v. Makris*, involving appellate court review of a federal trial court's retroactive competency hearing held pursuant to this court's remand, say little about the proper standard of review when examining a state court's pretrial competency hearing before a jury, however.[4] Our inquiry must necessarily be considerably less than de novo review. In *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the Supreme Court determined the appropriate standard of review in a federal habeas proceeding resulting from a claim of insufficient evidence to support a state criminal conviction. Echoing this circuit's words in *Makris*, the Supreme Court pointed out that "a federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court." *Id.* at 318, 99 S.Ct. at 2788. The Court proceeded to point out that the relevant question for an appellate court "is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S.Ct. at 2789 (emphasis in original). This judicial review of all the evidence "impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* The test laid down in *Jackson* is thus a safety net designed for appellate court review of constitutional error. The *Jackson* test grew out of the constitutional rule requiring proof beyond a reasonable doubt for a criminal conviction.[5] The *Jackson* standard accommodates both the constitutionally compelled burden of proof under state law (proof beyond a reasonable doubt) and the presumption of correctness due jury verdicts generally. In this case, we have a constitutionally grounded state burden of proof declaring that an accused is not to be subjected to a criminal trial if there is a demonstration of incompetence by a preponderance of the evidence before trial.[6]

3. "But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication.... Especially in cases arising under the Due Process Clause it is important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits."

420 U.S. at 175 n.10, 95 S.Ct. at 905 n.10 (quoting *Watts v. Indiana*, 338 U.S. 49, 51, 69 S.Ct. 1347, 1348, 93 L.Ed. 1801 (1949)).

4. Note, too, that *Bruce* and *Makris* both involved review from a trial *judge's* specific fact-findings. "Hard look" review was thereby facilitated.

5. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

6. While appellant White does not challenge the constitutionality of the Texas burden of proof, we note in passing that our precedents indicate that "it is entirely proper to place the burden

We also have a jury verdict of competence entitled to a presumption of correctness. By contrast to *Bruce* and *Makris*, our court now sits in review of a state jury verdict that has already been examined by a district court on the basis of "all the evidence." Ours is second-tier review, as in *Jackson v. Virginia*. Our standard, therefore, must be that appropriate to a *Jackson*-type safety net, a final bulwark against convictions unsoundly based in evidence. Viewing the evidence in the light most favorable to the jury verdict, we must ask whether any rational trier of fact could conclude that the evidence does not predominate in favor of the appellant's claim of incompetence.

Applying this standard to the evidence presented to the jury below does not yield easy results. This is, admittedly, a close case. The evidence at White's competency hearing suggests a battle between three experts, a psychiatrist and two clinical psychologists, and two lay "witnesses," the deputy sheriff present at White's arrest and his jailer of two years. A psychiatrist, Dr. Weddige, testified that he believed White suffered from hallucinations, could not distinguish between reality and fantasy, and that, while White understood the charges against him, he was incompetent to consult with his lawyers. The psychiatrist's diagnostic tests confirmed that White was "chronically psychotic," *i.e.*, suffered from a schizophrenia of long standing. In the face of severe cross-examination, the psychiatrist maintained that he did not believe White was faking his symptoms. Both clinical psychologists confirmed these findings. Their battery of clinical tests led them to conclude that White was a paranoid schizophrenic with an IQ of 69–75 (showing "borderline mental retardation"). Both psychologists also testified that they believed that White was not competent to stand trial and suffered from "organic brain syndrome." Defense counsel thereafter testified that his client was not competent to talk to him. The state's experts, a neurologist and a radiologist, testified that neither had attempted to examine White for evidence of mental disorder. Their expertise was limited to examination for organic brain damage, and their conclusion was that no organic brain damage greater than one inch in diameter could conceivably be present. Apparently because of these experts' limited expertise, no one asked either for his opinion of White's competence.

Thus, the only state witnesses to testify that White was competent were nonexperts, White's jailer and a deputy sheriff. Both stated that White behaved like other prisoners and appeared to communicate normally with his attorneys. Throughout, the state urged the jury to find that the "jail-wise" defendant had simply fooled his medical examiners. To this end, the state pointed out that, while the lay witnesses had spent long periods of time with the defendant, the experts had merely consulted with him for a brief two hours. Through effective cross-examination, the state showed inconsistencies or contradictions in the experts' testimony,[7] demonstrated the experts' dependence upon subjective symptoms, such as defendant's descriptions of his hallucinations, and cast doubt on the objectivity of the expert evidence presented.[8]

on the petitioner." *Bruce v. Estelle*, 536 F.2d at 1059 (citing *Drope v. Missouri*, 420 U.S. at 174, 95 S.Ct. at 905). "Similarly, proof by a preponderance ... is all that is required .... To place a greater burden on the petitioner might bring up due process considerations." *Id.*

7. Thus, the state showed on cross-examination that Dr. Weddige, in an earlier written report, had written of White:

> He knew why he was being examined. He seems quite informed about competency versus incompetency, and the meaning that this had for him insofar as what would happen to him.... With reference to whether he is competent or incompetent to assist his lawyer in preparation of his defense, in honesty—I don't know.

In the written report, Dr. Weddige said that White's condition would only "impair him from defending himself ...." Dr. Weddige retreated from these earlier views on the witness stand.

8. Thus, the state on cross-examination elicited testimony from one of the clinical psychologists that his report was written basically to

[3-5] As we have often pointed out, "expert opinion is not binding on the trier of fact if there is reason to discount it." *Makris*, 535 F.2d at 908; *Mims v. United States*, 375 F.2d 135, 143-44 (5th Cir. 1967). In this case, we cannot say that the jury "arbitrarily ignored"[9] the expert testimony presented in favor of the personal views of laymen. The evidence presented a genuine issue of credibility between the views of the laymen and the experts. The views of White's two clinical psychologists were at least partly challenged by the state experts' conclusions regarding organic brain damage. The jury was, of course, not bound by the medical experts' "application of legal standards to arrive at a competency conclusion," since this is ultimately their task. *See Makris*, 535 F.2d at 908. Cases pitting lay and expert testimony against each other turn, of course, on their particular facts. *See, e.g., United States v. Mota*, 598 F.2d 995, 998-1000 (5th Cir.), *cert. denied*, 444 U.S. 1084, 100 S.Ct. 1042, 62 L.Ed.2d 770 (1979) (testimony of lay witnesses, DEA agents, rebutting uncontradicted testimony of an expert psychiatric witness sufficient, as a matter of law, to present question to jury); *United States v. Collier*, 453 F.2d 1173 (5th Cir. 1972) (ten lay witnesses supporting government's claim of sanity did not, as a matter of law, sufficiently rebut testimony of seven psychiatrists who had all concluded defendant was insane); *Brock v. United States*, 387 F.2d 254 (5th Cir. 1967) (testimony of three lay witnesses, only one of whom observed defendant at time of crime, insufficient to rebut testimony of one psychiatrist who extensively examined defendant after criminal activity). The facts underlying our recent opinion in *United States v. Andrew*, 666 F.2d 915, 921 (5th Cir. 1982), come the closest to the situation *sub judice*. That case, dealing with the government's burden of proving sanity beyond a reasonable doubt, summarized the underlying evidence of sanity as follows:

> We find that we are presented with expert government testimony ... which does nothing to negate the defense testimony ... that there was a high probability that Andrew was legally insane. If this testimony, buttressed by the defense lay testimony, were the only testimony, the case for sufficiency would be difficult to sustain.
>
> We are presented, however, with the testimony of government lay witnesses who observed Andrew at the time of the crimes. Under this court's decisions in *Mota*, [*United States v. Hall*, 583 F.2d 1288 (5th Cir. 1978)], and *Mims*, such testimony provides sufficient evidence, as a matter of law, to sustain the jury verdict. Even in the face of expert testimony that Andrew could have seemed normal while suffering legal insanity, the lay testimony asserting normal behavior is considered sufficient to present a jury question.... Thus, in spite of equivocal expert testimony by the government, we are compelled to affirm the jury verdict of sanity.

Id. In this case, the state's expert testimony certainly did little, if anything, to negate White's experts' testimony of incompetence. The state proceeded, however, to call lay witnesses and to cross-examine White's experts. Viewing the evidence in the light most favorable to the jury verdict, we find that a reasonable juror could have decided that White failed to show his incompetence by a preponderance of the evidence.

White's second ground for habeas relief, a claim that there was insufficient corroborative evidence to support the capital murder conviction, does not merit much discussion. White's claim is based on Texas law requiring corroborative evidence of the elements of the *corpus delicti* of capital murder. *Ruff v. State*, 157 Tex.Cr.R. 514, 249 S.W.2d 922 (Tex.Crim.App.1952); *Lott v. State*, 141 Tex.Cr.R. 366, 148 S.W.2d 1102 (1941). White alleges that there was insufficient evidence to corroborate his written confession of robbery to establish the *corpus delicti* of capital murder.

[6] We doubt, though we need not decide, that the Texas rule on corroborative

bolster and corroborate what the other clinical psychologist had already stated in his report.

9. *Brock v. United States*, 387 F.2d 254, 257 (5th Cir. 1967).

evidence is a cognizable constitutional claim on collateral review by a federal court. *See, e.g., Llewellyn v. Stynchcombe*, 609 F.2d 194, 196 (5th Cir. 1980).[10] In any case, the state courts, both trial and appellate, as well as the district court below, found that the circumstantial evidence presented at trial sufficiently corroborated the appellant's confession, and we adopt the opinion of the Texas Court of Criminal Appeals on this point. 591 S.W.2d at 863–64. The Texas Court of Criminal Appeals' discussion of the evidence presented supports its conclusion that there was sufficient corroborative evidence, including evidence of tire tracks and eyewitness testimony, that tended to support the contents of White's confession. Insofar as White is attempting to raise a question of sufficiency of the evidence, under *Jackson v. Virginia, supra*, we have no doubt that the circumstantial evidence, together with White's confession, was amply sufficient for a jury to find White guilty beyond a reasonable doubt.

AFFIRMED.

Edward BOWEN, et al., Plaintiffs-Appellants,

v.

Charlie WATKINS, Chief of Police of the City of Columbus, Mississippi, Etc., et al., Defendants-Appellees.

No. 81-4029.

United States Court of Appeals, Fifth Circuit.

March 8, 1982.

Police officers brought civil rights suit, alleging violations of their constitutional right of free speech. The United States District Court for the District of Mississippi, L. T. Senter, Jr., J., entered judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) trial court applied proper standard; (2) trial court did not clearly err in concluding that unrest arising out of officers' activities was not substantial or motivating factor in decision not to promote officers but district court did clearly err in finding that unrest was not substantial or motivating factor with respect to chief of police, who testified that unrest was a "major" factor in his decision; (3) defendants could not permissibly base adverse employment decision on unrest which was predictable and inevitable result of officers' request for hearing; and (4) remand was warranted for determination whether same decision would have been reached with respect to officers absent constitutionally protected conduct and for determination whether city council or city might be held liable for actions of chief of police.

Affirmed in part, reversed in part, and remanded.

1. Constitutional Law ⇐82(11)
Officers and Public Employees ⇐91

Public employees do not surrender First Amendment rights by accepting government employment, although in determining whether a particular communication is protected, bona fide interest of state, as employer, in efficient provision of services must be balanced against interest of employees in free expression and the interest of the public in hearing the communication. U.S.C.A.Const.Amend. 1.

2. Constitutional Law ⇐82(11)
Officers and Public Employees ⇐76

Employee who would have been fired regardless of whether he exercised constitu-

10. As we stated in *Cronnon v. Alabama*, 587 F.2d 246, 250 (5th Cir.) (quoting 5th Cir. cases), *cert. denied*, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 792 (1979):

> We have repeatedly admonished that "we do not sit as a 'super' state supreme court" in a habeas corpus proceeding to review errors under state law .... The "mere violation of evidentiary rules by the state trial court does not in itself invoke habeas corpus relief, but only where the violation of the state's evidentiary rules results in a denial of fundamental fairness should habeas be granted."

(citations omitted).

DOCKETED

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 20 1980
JOSEPH [illegible], JR., CLERK
BY [illegible] Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

ROBERT LEE WHITE,	I	
	I	
PETITIONER	I	
	I	
VS.	I	CA5-80-78
	I	
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPT. OF CORRECTIONS,	I	
	I	
RESPONDENT	I	

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

The court has reviewed the pleadings and the state court records filed in this proceeding and has considered the Report and Recommendation of the United States Magistrate and the objections to that Report filed by petitioner and those objections filed by the attorneys who represented petitioner at trial and on appeal. The primary thrust of the objections to the Magistrate's report is directed at the evidence adduced at the competency trial. This court has, therefore, particularly reviewed all of the evidence as reflected by the statement of facts of the competency trial.

The issue presented by the objections to the Magistrate's report is whether the testimony from the psychiatrist and the two clinical psychologists, each of whom examined petitioner on three occasions, greatly preponderates to show that petitioner was incompetent to stand trial and that the testimony adduced by the prosecution from lay witnesses who had occasion to observe petitioner on a frequent basis was not adequate to negate or rebut petitioner's claim of incompetence. The jury answered

special issues adverse to petitioner's position. The evidence adduced was legally sufficient to enable a rational trier of fact to make the same findings which the jury made.

The factual determination made by the jury in the competency trial, the findings of the magistrate on the remaining issues, and the comprehensive opinion of the Court of Criminal Appeals of Texas are each supported by the record before the court. The court adopts those findings and the recommendation to deny the application for writ of habeas corpus.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The clerk is directed to file this order and to mail a copy of the order and of the Report and Recommendation of the United States Magistrate to petitioner, a copy of each to the attorneys of record, and a copy of each to the presiding judge of the 137th District Court of Lubbock County, Texas.

ENTERED at Lubbock, Texas, on this 18th day of August, 1980.

Halbert O. Woodward
United States District Judge

DOCKETED

FILED
JUL 24 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

ROBERT LEE WHITE,

PETITIONER

VS. CA5-80-78

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPT. OF CORRECTIONS,

RESPONDENT

REPORT AND RECOMMENDATION

Petitioner, Robert Lee White, is a state prisoner by virtue of judgment and sentence of the 137th District Court of Lubbock County, Texas, in cause number 15,714. In a jury trial commencing on February 28, 1977, he was found guilty under an indictment charging him with the felony offense of murder and punishment was assessed at confinement for life in Texas Department of Corrections. The Court of Criminal Appeals of Texas, en banc, affirmed the conviction by its written opinion delivered December 12, 1979. White v. State, 591 SW2d 851 (Tex. Crim. 1979).

Petitioner has filed application for writ of habeas corpus pursuant to 28 U.S.C. §2241, et seq. and is proceeding in forma pauperis. He contends that (1) he was denied due process and equal protection when the trial judge denied him fifteen peremptory challenges to the jury panel from which the jurors were selected for separate trial on the issue of competency; (2) the jury's verdict on the trial of the competency issue was so contrary to the evidence that due process was denied; (3) his constitutional right to a jury trial was infringed when the

judge who qualified the members of the central jury pool excused five prospective panel members for economic reasons without first obtaining the consent of petitioner's counsel; (4) his constitutional right to a jury trial was infringed when the state's challenge to one prospective juror for cause was sustained by the trial judge in violation of Witherspoon rules; (5) the confession which was admitted into evidence was not voluntarily made, but was the product of incommunicado detention and coercive interrogation in absence of counsel and that he was mentally incapable of making a knowing and intelligent waiver; and (6) the evidence was insufficient to support the conviction.

The state court records, consisting of statement of facts of a separate competency trial, transcription of jury voir dire, statement of facts of hearings on pretrial motions, statement of facts of trial on merits, briefs on appeal, and the transcript of all state court proceedings have been filed as exhibits in this case. Petitioner has exhausted available state remedies by raising on direct appeal the same issues which he presents by the instant application.

Petitioner's first two challenges are to issues relating to his competency to stand trial. The principle is well established that the conviction of an accused while he is not legally competent to assist in his own defense violates fundamental interests of due process. Bishop v. United States, 350 U.S. 961 (19560. State procedures must be adequate to protect that right. Pate v. Robinson, 383 U.S. 375 (1966). Texas law protects that right by providing that, where there is evidence to support a finding of incompetency to stand trial, a jury shall be impaneled, separate from the jury selected to determine guilt

or innocence of the defendant, to determine defendant's competency to stand trial. Texas Code of Criminal Procedure, Article 46.02, §4(a). The test to determine competency to stand trial "must be whether defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960); Bruce v. Estelle, 5th Cir. 1973, 483 F2d 1031. The purpose for a separate trial on the issue of competency to stand trial is to provide a forum for the determination of an accused's competency, uncluttered by the evidence of the offense itself. The issue of competency should be made without the introduction of facts which might tend to cloud the issue at hand, facts which alone might so stir the minds of the jury as to make difficult the exercise of calm judgment upon the issue of competency.

In this case White had put his competency in issue by several pretrial motions. Pursuant to the Texas statute a separate trial on the competency issue was conducted on January 5, 1977.

In a capital murder case an accused is entitled, under Texas law, to fifteen peremptory challenges on the trial on the merits. Texas Code of Criminal Procedure, Article 35.15(a). Petitioner filed motion with the trial court, requesting the same number of peremptory challenges during the voir dire examination of prospective jurors at the competency trial.

The trial judge denied that motion and allowed each side ten peremptory challenges. The Court of Criminal Appeals of Texas, in its comprehensive opinion, noted that no part of the

Code of Criminal Procedure specifies the number of peremptory challenges in a competency hearing. That Court concluded, however, that the separate competency trial involves issues which are not criminal in nature. The burden of proof in the competency hearing is on the defendant to prove his incompetency by a preponderance of the evidence. The Court of Criminal Appeals concluded that the hearing is civil in nature and, therefore, Rule 233 of Texas Rules of Civil Procedure, providing for six peremptorychallenges, should apply. In this case White was afforded ten peremptory challenges, four more than that to which he was found to be entitled by the Court of Criminal Appeals of Texas. Petitioner's first challenge presents no claim of constitutional dimensions.

Petitioner next contends that the jury's verdict on the competency trial was so contrary to the great weight and preponderance of the evidence as to be manifestly wrong and unjust. He does not contend that there is no evidence to support the verdict. The insufficiency contention was considered by the Court of Criminal Appeals of Texas in its comprehensive opinion. That appellate court discussed the difference between a "no evidence" question, which is a question of law, and an "insufficiency" question which is a question of fact. It concluded that it had no right to substitute its findings on a fact issue for those of the jury which heard and determined the factual disputes. Certainly this federal court should not substitute its findings of fact where there is evidence in the record which supports the factual determination made by the jury.

Respondent contends that the jury's verdict in the competency hearing is supported by legally sufficient evidence when the

record is reviewed in the light most favorable to the prosecution as required by Jackson v. Virginia, 443 U.S. 307 (1979). Respondent could be assuming more burden than is required, because Jackson v. Virginia was one where the burden was on the prosecution to prove guilt beyond a reasonable doubt. In the competency trial the burden was on petitioner to establish by a preponderance of the evidence that he was incompetent. Even when that greater burden of Jackson v. Virginia is applied, however, there is legally sufficient evidence upon which any rational trier of facts could have made the same findings which the jury in the competency trial found.

Lubbock County uses the central jury pool system, with a different judge presiding over the central panel each week. The entire panel is qualified in the central jury pool by that presiding judge and assignments of panels are made to the different district and county courts for that trial week. On February 17, 1977, petitioner's attorney had presented a motion to the trial judge which requested that counsel be present in the central jury room when the jury panel for the trial week was to be qualified and that counsel be permitted to object to any of the court's ruling as to excuses that might be offered by prospective jurors. Apparently the trial judge granted the motion, but the motion was not brought to the attention of Judge Shaver, who was the presiding judge for the applicable week, until February 23, 1977. At the time the motion was called to Judge Shaver's attention he immediately notified counsel that he had already personally excused five prospective jurors to a later day in the term.

Petitioner's motion is based primarily on the provisions

of V.A.T.S. Art. 2120 which provides that the Court may hear any reasonable sworn excuse of a juror, and may release him entirely or until some other day of the term; provided, however, the Court shall not excuse any juror for economic reasons unless all parties of record are present and approve such an excuse". (emphasis added). The Court of Criminal Appeals, in its opinion, discussed and rejected the challenge advanced by petitioner. It reviewed the record which showed the bases for those five propective jurors being excused by the presiding judge of the central jury pool. It concluded that while the excuses offered by the five prospective jurors were job related there was no showing that they were excused for economic reasons and no violation of Article 2120 were shown.

Even had the jurors had been excused in violation of Article 2120 no basis for federal habeas relief is presented. Petitioner has not demonstrated that he was harmed in any manner and nothing presented by his pleadings reflect due process denial. At most it presents a claim of failure of a state court to follow its own procedural rules which, without more, does not present a federal constitutional question which is cognizable in habeas corpus.

Petitioner contends next that the state's challenge for cause to one prospective juror should not have been sustained, because that juror was not disqualified under the test of Witherspoon v. Illinois, 391 U.S. 510 (1968). Texas Penal Code §12.31(b) provides that "prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be

disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issues of fact." The challenged juror could not take the oath mandated by §12.31(b). The trial judge sustained the state's challenge for cause on the ground that she could not take the 12.31(b) oath and found also that the test of Witherspoon had been met with regard to her disqualification. The Court of Criminal Appeals of Texas fully discussed the issue and noted the holding in the panel opinion in Burns v. Estelle, 5th Cir. 1979, 592 F2d 1297. Subsequently on June 25, 1980, the United States Supreme Court considered that Witherspoon and §12.31(b) may not coexist as separate and independent bases for excluding jurors so as to permit exclusion unde §12.31(b) on grounds broader than permitted by Witherspoon. Adams v. Texas, ___ U.S.___48 L.W. 4869.

The Court of Criminal Appeals opinion concluded, however, that Witherspoon has no application where the death penalty is not imposed. Under the circumstances of this case, where a life sentence was assessed, the challenge does not rise to constitutional dimensions.

The Court of Criminal Appeals of Texas, in its comprehensive opinion, fully discussed petitioner's final challenges--that is, that the confession which was admitted into evidence was not voluntarily made, but was the product of incommunicado detention and coercive interrogation in absence of counsel, that he was mentally incapable of making a knowing and intelligent waiver, and that the evidence was insufficient to support the conviction. The appellate court's opinion is supported by the record and may be adopted by this court. Certainly a rational trier of

the facts, after viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt as required by Jackson v. Virginia, 443 U.S. 307, (1979).

I recommend that the comprehensive opinion of the Court of Criminal Appeals of Texas be adopted by the Court. I further recommend that the application for writ of habeas corpus be denied.

The clerk is directed to file this Report and Recommendation and to send a copy of it to petitioner and a copy to the attorneys for respondent. Any party may object to the proposed findings and to the recommendation within ten days after being served with a copy thereof. Such party shall file with the clerk of the court, and serve on the Magistrate and all parties, written objections which shall specifically identify the portions of the findings, recommendation, or report to which objection is made and shall set out fully the basis for each such objection.

Recommended at Lubbock, Texas, this 23rd day of July, 1980.

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United States Magistrate